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SUBJECT: UPDATE ON KENYAN PIRACY PROSECUTIONS

REF: 2008 NAIROBI 2869

11. Summary: There are currently 100 Somali piracy suspects being held in Kenya, including nine delivered by the Italian Navy on June 26. The manner of delivery and quality of evidence, as much as the number of transfers, has dampened Kenya's enthusiasm for piracy cases. A few cases were delivered by EU countries (including Italy and France) with little prior consultation with Kenya and/or with weak evidence. The large number of deliveries in quick succession (more than 70 suspects within three months) resulted in these newer cases receiving less attention from police, prosecutors, and courts than earlier cases. Consequently, the informalities and weaknesses of the Kenyan judicial system became more pronounced. For example, some defendants made initial court appearances without defense counsel, assigned prosecutors, or translators. In one recent case, defense lawyers successfully stalled proceedings when the magistrate suspended witness testimony (including that of civilian witnesses flown in from Manila) in order to consider the defense motion challenging the court's jurisdiction. While the motion is not expected to succeed, delays of this kind may make it extremely difficult to ensure the timely appearance of both civilian and military witnesses in the future. Care must also be taken to ensure that defendants' human rights are respected in practice.

12. Summary, cont. On May 29, Parliament passed the Merchant Shipping Act and rewrote the penal code provisions dealing with piracy. Most of the language repeats provisions of the UN Convention on the Law of the Sea and when it becomes law it should not significantly change how piracy cases are prosecuted in Kenya. The international community's assistance, fact-finding missions, invitations to conferences, advice, expectations, and scrutiny threaten to overwhelm this small and antiquated criminal justice system's ability to absorb it all, particularly at a time when the government of Kenya (GOK) is focused on its larger political crises and pressing need for progress on the reform agenda. End summary.

DEFENSE CHALLENGES DELAY WITNESS TESTIMONY IN U.S., GERMAN CASES

13. On June 30, 11 U.S. Navy and Coast Guard personnel

(accompanied by Navy and Coast Guard JAG officers) and two Filipino seamen were assembled in Mombasa to testify in the trial of seven Somalis accused of piracy. The suspects were captured by the USS Vella Gulf on February 11, 2009 after they attempted to seize the MV Polaris, a Marshall Islands-flagged vessel. They were turned over to the Kenyan authorities on March 8. Trial was scheduled for July 1-2 and July 7. However, only one U.S. witness testified before the magistrate suspended proceedings to consider a defense motion challenging Kenya's jurisdiction. The magistrate is expected to deny the motion when he rules on July 16. (Note: The High Court of Kenya has rejected the same jurisdictional challenge made earlier on appeal by defendants captured by the U.S. Navy and convicted in 2006. This ruling is generally viewed as binding on this issue.) However, the case is likely to be continued until September due to lack of courtroom availability, so the witnesses were sent home with the hope that they may be able to return when trial resumes. Logistics and expenses for the Filipino crewmembers' participation in the trial were arranged by the Marshall Islands maritime organization and the private shipping company that employed them. (Note: A similar motion challenging jurisdiction was also made during the week of June 29 during the piracy trial of nine Somalis caught by the German Navy and handed over to Kenya on March 11, and it also resulted in a delay of that trial.) Post's Department of Justice Resident Legal Advisor and Bernadette Mendoza, the Deputy Chief of Mission from the Embassy of the Philippines in Nairobi, traveled to Mombasa to meet and assist the witnesses and participated in pretrial conferences with prosecutors. Ms. Mendoza indicated that her government remains very concerned about the impact of piracy

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on its seafarers, and noted that there are currently 46 Filipino seamen being held hostage for ransom in Somalia, the largest number from a single country.

OTHER UPCOMING CASES

14. There are currently 100 Somali piracy suspects being held in Kenya, including nine transferred by the Italian Navy on June 26. The second case of piracy suspects captured by the U.S. Navy (the USS Gettysburg) is scheduled to be heard on August 24-25. Other trial dates in August are: August 3-5, 11 suspects, French capture; August 6-7 and 10, 14 suspects, Spanish capture; August 10-11, 11 suspects, second French capture; and August 19-20, 8 suspects, resumption of UK capture case.

KENYAN FRUSTRATION WITH RECENT ITALIAN, FRENCH CASES

15. The manner of delivery and quality of evidence in some recent cases, as much as the number of transfers, has dampened Kenya's enthusiasm for these cases. For example, a representative of the UN Office on Drugs and Crime (UNODC) reported that the Italians had initially "arraigned" the suspects they captured before an Italian magistrate via ship-to-shore teleconferencing while the suspects were still at sea. He also said that the Italian government decided against prosecuting the suspects in Italy, that the Italian Parliament passed legislation to permit transfer to Kenya, and that Kenya was pressured to accept the suspects, who were delivered to Mombasa with accompanying evidentiary documents in Italian. The Kenyan prosecutors are now seeking approval from the Attorney General to reject this prosecution. If this happens, it is unclear what the disposition of the suspects will be.

16. Prosecutors have also faced challenges in a French case that was initially framed as an assault by piracy suspects on a French warship. The UNODC representative who has seen the evidence reports that, although the suspects were apprehended on the high seas with piracy paraphernalia (e.g. AK47s and RPGs), there is no evidence that they attacked the French ship or attempted any acts of piracy. The prosecutors may attempt to charge the suspects with conspiracy to commit

piracy or similar acts under the penal code, but even these charges will be difficult to prove under the circumstances. The French and Italian cases have led the GOK to demand that all future requests for prosecution be accompanied by a full evidence package (something the GOK noted the United States is already providing) so they can determine before transfer whether or not Kenya will accept the case. Given the structural and capacity limitations of the Kenyan legal system, weak cases should not/not be brought to Kenya for prosecution.

HUMAN RIGHTS AND DUE PROCESS CONCERNS

¶7. The UNODC representative in Mombasa also reported that some recent cases were not handled well by the Kenyan authorities. She observed suspects appearing at their initial hearing without legal representation, and no or inadequate Somali language translation provided during proceedings. (Note: Indigent Kenyan defendants do not have a right to defense counsel, except in cases where the maximum penalty is death. The maximum penalty for a piracy conviction is life imprisonment.) She was also concerned by a case where one suspect was reported to be a juvenile who had confessed and provided a statement against his fellow suspects. At the time the case was presented, all the suspects were represented by one attorney, and the juvenile's confession was reported in open court. One defense counsel should not represent clients with potentially conflicting interests, but it is not clear what measures (if any) will be taken to ensure appointment of separate counsel for the juvenile. It is also unclear what accommodation, if any, has been made to separate the juvenile from his fellow suspects in custody and to house him separately from adult inmates.

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¶8. Adequacy of legal representation for piracy suspects will continue to be an issue. So far, it appears the suspects' families or clans had pooled sufficient resources to retain counsel. However, in cases where suspects do not have sufficient funds or co-defendants need to be represented by more than one attorney due to conflicts of interest, Kenya does not provide state-funded counsel. The EU-funded UNODC program has funding to provide defense counsel, but UNODC and the Kenyan Department of Public Prosecutions (DPP) are reluctant to advertise this. Funding representation for piracy suspects may require UNODC to develop and administer a miniature legal aid program, and could have negative effects on the small legal community in Mombasa without careful oversight. For example, the lure of large retainers or even consistent and reliable pay might capture the entire local defense bar, leaving less representation available for Kenyan defendants. International attention to piracy cases has brought foreign defense attorneys to Kenya who are seeking to get involved, but there is no mechanism permitting foreign defense attorneys to appear in Kenyan courts unless they are licensed members of the Kenyan bar.

¶9. The international community must be as vigilant as possible in ensuring that the fundamental rights of piracy suspects turned over to Kenya are protected. This task is made both more difficult and more necessary by Kenya's informal and often troubled criminal justice system. Thus far, in the U.S.- and UK-generated cases, the fundamental rights guaranteed defendants under Kenyan law, which are largely consistent with international norms, have been respected. For example, Somali translators have been present and actively engaged in the proceedings, the suspects were apprised of the charges against them, they were represented by defense counsel (who were provided with copies of witness statements, photographs, and other evidentiary documents and who actively, if not skillfully, cross-examined witnesses and made legal challenges), and they were permitted to appeal their convictions. In the Polaris hearing, the court's willingness to suspend the proceedings based on the defense counsel's jurisdictional challenge supports the view that

defendants' legal rights will be taken seriously in these cases. However, as the number of cases increases, the challenge of ensuring fair proceedings, legal representation for defendants, and humane conditions of confinement will have to be addressed. (Note: An informal report by a visiting UNODC expert on Mombasa's Shimo la Tewa prison, where the piracy suspects are detained, was quite complimentary of the institution. UNODC has earmarked a large portion of their piracy program funds for upgrading conditions at Shimo la Tewa.)

PERSONNEL LIMITATIONS

¶10. The small number of prosecutors and judges continues to be a major limitation on Kenya's capacity to prosecute crime, including significant numbers of piracy cases. The GOK has long recognized the problem, and the international community has continually urged that the number of judges and prosecutors be increased. However, the GOK has been extremely slow to appoint new judges and prosecutors. Foreign prosecutors cannot appear in Kenyan courts, and while the DPP appreciates advice and assistance, they do not want full-time or embedded foreign lawyers. (Note: Against the RLA's recommendation and the DPP's expressed wishes, UNODC placed an EU-funded lawyer in Mombasa. Initial reports indicate that her engagement has not been particularly successful or productive.)

¶12. The DPP has 62 prosecutors who cover the entire country. Most street crime (except murder) is handled by police prosecutors, who are not trained lawyers. The DPP has assigned 12 of the 62 prosecutors to the "Anti-Piracy Unit." Four members of that unit have prosecuted piracy cases to date, and two are located in Mombasa. As prosecutors "assigned" to the Unit are likely to retain their previous

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assignments, duties, and caseloads in addition to the piracy mandate, the designation of the unit will not have a significant effect on Kenyan capacity to prosecute piracy cases.

¶13. Given the personnel limitations, the best approach to helping Kenya is to help the few available staff to work more efficiently. We recommend ensuring that the cases transferred are strong and well-organized; providing additional training for prosecutors on how to prepare and try these cases efficiently; and providing quick and efficient trial support (i.e. arranging logistics and funding for foreign witness appearances at trial). We have also urged that the international community fund a paralegal or equivalent position to assist the DPP with intake, file organization, and liaison activities. Although the EU promised months ago to support this position, bureaucratic requirements instead led the EU to fund the embedded British prosecutor in Mombasa, a move which has not been welcomed by the DPP. UNODC subsequently agreed to hire a Kenyan to undertake these administrative/clerical support functions. The UNODC advertised publicly for a junior assistant to work in the DPP's Mombasa office. However, since the UN salary for this position is \$48,000 per annum, approximately double the average prosecutor's salary, both the lead prosecutor in Mombasa and the senior piracy policy lead at the Ministry of Foreign Affairs applied for the position. UNODC was forced to withdraw the job announcement and plans to revise the job description and salary and re-advertise the position.

TRAINING AND EQUIPMENT SUPPORT

¶14. The U.S. Department of Justice has been providing training to the DPP since 2005. As of May 2009, all prosecutors have received training in trial advocacy and most of them have also attended advanced courses covering a wide variety of subjects (including, for example, witness protection, financial crimes, cyber crimes, and terrorist financing). In July, the RLA will train additional

prosecutors, including 16 new hires, in trial advocacy and will train 30 magistrates on administrative best practices including case management and modern trial practice. To date in 2009, we have conducted two piracy-specific workshops, and RLA and UNODC plan to hold another piracy training at the end of July. The participants in these trainings include prosecutors, police, and maritime security personnel. The RLA is also exploring offering additional training to judges and magistrates on piracy and terrorism cases.

¶15. The financial and material resources of the DPP to try piracy cases are also limited. However, in the last five months, the DPP has received four laptop computers (two from Germany and two from EU/UNODC), two printers (Germany and EU), and two fax/scanner/printer/copiers (United States and UNODC). The United States also provided the DPP with a variety of expendable office supplies. USAID previously equipped all DPP offices throughout Kenya with computers, printers, and phones as part of a capacity-building initiative with the DPP. The RLA also developed and delivered forms and evidence/trial notebooks to help the DPP standardize the intake, filing, and trial presentation of these cases. UNODC plans to provide Mombasa police with digital cameras to record evidence. Assistance to date notwithstanding, the DPP continues to request that UNODC supply more equipment, including 22 more laptops. It is unclear why they need these items. The UNODC representative stated that prosecutors reported that two of the donated laptops are "missing after an office move." It also appears that other donated equipment is not being utilized effectively or at all.

¶16. UNODC has also agreed to pay travel, lodging, and per diem expenses for prosecutors traveling between Mombasa and Nairobi on piracy-related business. In the past, prosecutors traveled between the two cities as their jobs demanded largely without reimbursement. However, provision of these

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funds (which are significant in relation to prosecutors' low government salaries) without adequate oversight has had the undesirable effect of increasing the number of prosecutors "assigned" to piracy cases as well as the number and length of trips deemed necessary. UNODC has begun tighter control over expense payments, but with resulting hostility from prosecutors who were enjoying the earlier largesse.

¶17. UNODC has also agreed to upgrade two Mombasa courtrooms by modernizing the air conditioning and electrical systems. It has also committed to making improvements in the prisons where most of the piracy suspects are held. We do not know how much progress has been made in either of those projects.

INTERNATIONAL CONFERENCES AND VISITS

¶18. A number of prosecutors have been funded by UNODC to represent Kenya at international conferences on piracy. The lead prosecutor missed an important oral argument before the appellate court because he was attending a piracy conference in Europe. The ever-increasing number of international conferences serve as a distraction from the prosecutors' core job functions. The UNODC representative appreciates the problem, but commented that he does not control the number of conferences being held and feels he cannot refuse to accommodate invitations for Kenya to participate. In the last six months, Kenya has hosted a number of international organizations on fact-finding missions (including the UN, EU, Interpol, and various components of interested Western governments). Most recently, UNODC hired an EU-funded British lawyer to conduct a survey of the laws and capacities of Kenya and other countries in the region. This survey follows closely after surveys done by the EU and UN several months earlier. The International Maritime Organization (IMO) has meanwhile expressed its view that it should be the lead agency on maritime matters. An IMO fact-finding mission led by Ash Roach will be in Kenya for two weeks at the end of

July. A planned NATO mission was postponed and is expected to be rescheduled for later this summer.

LEGISLATIVE UPDATE

¶19. To date, all piracy suspects have been charged under Kenya's independence-era penal code section 69. Although there were early concerns that the "bare bones" provision failed to define piracy and was not sufficiently explicit regarding Kenya's extraterritorial jurisdiction, these deficiencies have thus far not proven fatal to the prosecution. Section 69 will be superseded by the newly enacted Merchant Shipping Act, which was passed by Parliament on May 29. Following formal "notification of commencement" by the Ministry of Transportation (date TBD), the Act will become operable. The provisions of the Act relevant to piracy track closely with the language in the UN Convention on the Law of the Sea (UNCLOS), with a few omissions. Section 369 of the Act defines piracy in much the same way as the UNCLOS, but omits "on the high seas." The remaining portions of the definition and related provisions support the view that Kenya's claim of extraterritorial jurisdiction over piracy cases would still apply, and indeed might be slightly stronger under the new Act. The definition and jurisdiction elements are clearer than in the current law, and there is an added provision on robbery of ships. Overall, it is unlikely that implementation of the Act will significantly change how piracy prosecutions will proceed in Kenya.

COMMENT

¶20. The capture and prosecution of Somali pirates can play only a tiny role in the overall solution to the piracy problem in the region. Interdictions and prosecutions should continue, as should efforts to improve the prosecutorial capacity of regional states. However, even increased and problem-free prosecutions are likely to do little to deter pirate activity given the economic and political situation in Somalia, plentiful and vulnerable merchant shipping, and the

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willingness of shipowners and/or their insurers to pay large ransoms. Further, Kenya's justice system (and those of its neighbors) can only accommodate a limited number of cases, and can only absorb and benefit from moderate and sustained international assistance. In light of these facts, we should continue to discourage excessive focus on and uncoordinated efforts at rapidly building prosecutorial capacity in the region.

ABELL